

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7047

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PATRICIA A. FAHEY,
Plaintiff-Appellant,
against

SHIRLEY E. FAHEY and NORMAN CODO
Defendants-Appellees,

On Appeal From The Decision Of
United States District Court For
The Southern District Of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

Patricia A. Fahey
Plaintiff-Appellant
750 Park Avenue
New York, New York
10021

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ISSUES PRESENTED FOR REVIEW IN
ANSWER TO POINTS I AND II OF
DEFENDANTS-APPELLEES' BRIEF

1. Plaintiff's Motion appealing the District Court final Opinion, entered in the Civil Docket on the 14th day of December, 1976, was served within five days, since it was served on the 17th day of December, 1976, and;

The Affidavit supporting defendants' pre-answer Motion to Dismiss Plaintiff's Complaint under Rule 12(b) was signed by one of the defendants-executors-trustees, stating: "The estate of Patrick D. Fahey has no assets in the State of New York" and "Affiant further saith not".

Plaintiff contends that the Affidavit of the defendant-executor-trustee, Norman Cedo, supporting the Motion to Dismiss Plaintiff's Complaint under Rule 12(b) has been waived by the evidence submitted before the District Court, attached to plaintiff's Motion under Rule 60(b)(1), and by further evidence submitted on the 21st day of December, 1976, and that the final Opinion of

the 14th day of December, 1976, and Motion for Rehearing are therefore appealable by the rules.

STATEMENT ON THE CASE

Plaintiff-appellant has appealed from the Opinion of the District Court, entered in the Civil Docket on the 14th day of December, 1976, and from the denial of the Motion, entered in the Civil Docket on the 7th day of January, 1977, endorsed on the evidence, which supported the Motion. Said evidence establish that in the year, 1971, the real property in New York, involved in the action, belonged to plaintiff's father, and not to the defendant, contrary to a letter, dated the 11th day of December, 1970, submitted among the evidence before the District Court, wherein the defendant stated, "My lease".

The dislodging of the plaintiff from said real property, of which the executors held the lease in possession, was part of the cause which gave rise to the action. Said real property in New York was also an asset of Patrick D. Fahey's estate in addition to the lease of property up to 1986, held by Hewitt-Robbins of Passaic, New Jersey, a subsidiary of Litton Industries, as lessor,

which lease, property, and rental income were transferred by the defendants in the year, 1973, into a trust. (EV. 11, App. pg. 24, 25, 26).

PRIOR PROCEEDINGS IN ARGUMENT
WITH DEFENDANTS-APPELLEES" BRIEF

Plaintiff's Complaint was to recover \$114,000.00 plus interest, not as damages, as the defendants allege, but as outstanding monthly payments due to the plaintiff, since the death of her father as directed in his Will. In fact, \$2,000/month from January, 1971, to September, 1975, the date of the Complaint, equals exactly \$114,000.00, the amount in controversy at that time.

The defendants answered the Complaint declaring that the Court lacked jurisdiction over the persons of the defendants, and supported their Motion under Rule 12(b) to Dismiss the Complaint with the Affidavit of the defendant, stating, "The estate of Patrick D. Fahey has no assets in the State of New York." Because plaintiff could not prove her cause, the argument of the defendants held and plaintiff's Complaint was dismissed.

On appeal to this Court, the Order of the

District Court was confirmed, and plaintiff subsequently submitted a Petition for Rehearing, including in said Petition, a stay of mandate, since a Petition for Rehearing under Rule 41(a) of Federal Rules of Appellate Procedure includes a stay of mandate automatically. The Petition was denied. Plaintiff then respectfully requested a stay of mandate, pending a Petition for Certiorari under Rule 41(b), not knowing that said stay of mandate under Rule 41(b) had already technically been petitioned under Rule 41(a). Also in view of Sec. 10 of the Act of April 9, 1866.

Plaintiff moved before the District Court under Rule 60(b)(1) well within the time required and necessary for the Motion to be admitted and upon submission of evidence, which evidence, in the previous proceeding had never been presented before, since at that time, said evidence were not in plaintiff's physical possession, and, in addition, upon submission of additional evidence also pertinent to her cause of action.

Under this Motion, plaintiff respectfully requested as a partial relief, an Order for Power of Discovery pursuant to Rule 34, R.C.P., Title 28, which

gives access to "lands, documents, and things", and in plaintiff's case, to property, real or personal, documents, and things pertaining to the plaintiff, and since this power of discovery under this rule is extra-judicial.

ARGUMENT

- 1: DEFENDANTS' AFFIDAVIT SUPPORTING MOTION TO DISMISS PLAINTIFF'S COMPLAINT WAS WAIVED, NOTICE OF PLAINTIFF'S MOTION WAS SERVED WITHIN FIVE DAYS, AND THE DISTRICT COURT OPINION AND DENIAL OF PLAINTIFF'S MOTION ARE APPEALABLE
-

The defendants contend that plaintiff-appellant is actually seeking under Rule 34 R.C.P. power of discovery of the defendants, and that an appeal taken from a final Opinion denying a Motion entered under Rule 60(b)(1) is not an appealable order and that a Motion disproving the defendants' previous defense, served within five days from the final Opinion is also not appealable.

With respect to their claim, the defendants rely mainly upon Klein's Outlet, Inc. v. Lipton, 181 F.2d 713 (2d Cir. 1950) cert. denied 340 U.S. 833, 71 S.Ct. 59, 95 L.Ed. 612 (1950). The defendants failed to advise the

Court that the statement of the Court taken from that case to substantiate their claim was pronounced in a case as if there had been two motions for reargument from one final decision. Part of that statement pronounced by the Court is as follows:

"In a memorandum dated November 4th the district judge characterized the motion as one seeking "in effect, a second reargument".

The Court continued:

"On that date the motion for reargument filed on October 6 was still under advisement by the court. The appellant could not know whether or not the court would "entertain" it. In such a case, it would plainly be fair to relax the rule of the Wayne case to the extent of deducting from the time elapsing between the entry of a judgment and the taking of an appeal the period during which the Court holds under advisement the Motion for reargument." 181 F.2d 714, 715.

In plaintiff's case, if the time elapsing between the entry of the last final Opinion and the entry of plaintiff's appeal, is deducted, plaintiff's appeal is timely.

The last final Opinion of the District Court was entered in the Civil Docket on the 14th day of December, 1976. Plaintiff's Motion for Rehearing or reargument served on the 17th day of December, 1976, was denied by endorsement as Memorandum and Order on the 2nd day of January, 1977, and was entered in the Civil Docket on the 14th day of January, 1977.

Plaintiff's Notice of Appeal was submitted to the District Court on the 25th day of January, 1977.

By deducting the time between the 14th day of December, 1976, and the 2nd day of January, 1977, the period which the Motion was under consideration from 43 days, which elapsed between the 14th day of December, 1976, and the 25th day of January, 1977, the entry of plaintiff's Appeal, leaves 23 days, and plaintiff's Appeal would in this instance be timely.

By further permission by the Court should plaintiff follow the computation under Rule 6 R.C.P. which controls the time computation for the local rules of the District Courts, since the time in which the Motion had to be filed was less than seven days, by deducting the

intermediate Saturdays, and Sundays, between the 14th day of December, 1976, and the 25th day of January, 1977, the day of the Appeal, we arrive at exactly 30 days.

However, the certified docket sheet from Order and Appeal of the District Court clearly will show that in plaintiff's case there was only one Motion for Rehearing or reargument served:

- (1) A new final Opinion of the District Court was entered in the Civil Docket on the 14th day of December, 1976.
- (2) The endorsement of denial on the evidence, submitted within ten days from the 14th day of December, 1976, was entered in the Civil Docket on the 7th day of January, 1977.
- (3) The endorsement on the respective Motion, filed within five days from the 14th day of December, 1976, denying the Motion, was entered in the Civil Docket on the 14th day of January, 1977.

The defendants have stressed the fact, by underlining the word "pro se" in their brief, as if such self representation is a derogatory position, when, in

fact, the right of an individual to represent himself or herself is of a legal right. This statement from the defendants bears striking similarity to the letter of the 15th day of August, 1972, (EV. 7, App. pg. 20), written by one of the defendants, who, fully realizing that the plaintiff was indigent, stated that the estate of plaintiff's father is not responsible for said bills and that further bills should be directed to the plaintiff. In the present instance, the defendants, having withheld plaintiff's rightful resources, then condescend to her as a pro se.

Nevertheless, if the defendants gave to the plaintiff-appellant her rightful resources as directed by the Will, even now plaintiff-appellant would without question seek the aid and representation of one attorney and more, as the defendants-appellees have done, paying the respective fees and expenses for their attorneys most likely from the assets of plaintiff's father's estate or the assets which are excluded from the estate of which they are Executors, Trustees, and Fiduciary, and plaintiff a beneficiary and contingent executor.

The appellees also suggest that the total omission of plaintiff-appellant's name as a beneficiary and otherwise from the Federal Estate Tax returns Federal Form 706 (EV. 9, App. pg. 22) of her father is not a violation of her right to inherit property under the Will and otherwise and that such right to inherit, although included in the Act of April 9, 1866, is not a violation of civil rights and that such violation, when combined and supported by a tortious action and conduct under the long-arm statute, N.Y.C.P.L.R. 302 (a)3 . . . 4 is not a jurisdictional issue, and therefore plaintiff-appellant's Brief and Appendix and Complaint should not be considered.

Relevant sections of the Act of April 9, 1866 are set forth in the Addendum to this Reply Brief at page 14 and the Text of N.Y.C.P.L.R. 302 (a)3 . . . 4 on page 16 in the same Addendum.

That this long, drawn-out case, as the defendants have stated in their Brief, it's certainly not by fault of the plaintiff, but in the evasion of said defendants, by not adhering to their responsibility as executors-trustees, and fiduciary, which makes them personally liable.

That plaintiff's objective in this case is to

recover what belongs to her.

That the lease of plaintiff's father of the real property in New York, of which the rent was always paid six months in advance and of which the plaintiff was always the occupant, was a lease for a 9th year under an agreement between plaintiff's father and the Lexington-Madison Co. of New York subject to a 1% increase annually, which the Rent Guideline Board refers to as a "stabilizer".

That the annotation [sic] preceding "the lease of property" in the paragraph quoted by the defendants from the Opinion of the District Court, in Point II of their Argument was the very reason for plaintiff's submission of additional evidence and the Motion for a Rehearing or re-argument, which was served within the five days, the restricted period by the rules, applicable to such circumstances.

Further the "[T]he" appearing in the first paragraph quoted from Klein's Outlet, Inc. v. Lipton, on Page - 5 of Point I in Argument of defendants-appellees' Brief, cannot be related to plaintiff's case. Plaintiff's case cannot be the twentieth of a group, since plaintiff's

case does not belong to any of those groups, because plaintiff's case is a case where the defendants are trying to deprive plaintiff of her property and her right to inherit, a violation of civil rights under the Act of the ninth of April, 1866 and a violation which evolved also in a tortious conduct or act which falls under the New York State long-arm statute C.P.L.R. 302 (a)3 ... 4, not inconsistent with the statute and Constitution of the U.S..

The Motion submitted by the plaintiff under Rule 60(b)(1) disproving defendants' Affidavit in support of their Motion under Rule 12(b) to Dismiss Plaintiff's Complaint was submitted and supported by valid evidence. A new final decision was entered in the Civil Docket, and within five days, a Motion from that final decision was served by the plaintiff and additional evidence were also served within the same time, and the time running for the appeal was stopped.

The Affidavit of the defendants, supporting their first Motion under Rule 12(b) to Dismiss Plaintiff's Complaint was waived by the evidence presented before the District Court by the plaintiff. The defendants' Affidavit is the very base for their defense in the entire case.

Plaintiff-appellant stands behind her Brief and Appendix.

CONCLUSION

The defendants-appellees should answer the question set forth in plaintiff-appellant's Brief on the grounds that the plaintiff's evidence disprove defendant's Affidavit in support of their Motion under Rule 12(b) to Dismiss Plaintiff's Complaint, and that plaintiff's Appeal has been made in just cause in accord with the rules and within the proper time.

That plaintiff-appellant may be granted the relief sought in her Brief, and the relief sought in her original Complaint to afford fees to hire an attorney.

* * *

Respectfully submitted,

Patricia A. Fahey

Patricia A. Fahey

Plaintiff-Appellant

ACT OF APRIL 9, 1866

THIRTY-NINTH CONGRESS, SESS. I. CH. 31

CHAP. XXXI. - An Act to protect all Persons in the United States in their Civil Rights, and to furnish the Means of their Vindication.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States . . .

" shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, . . ."

SEC. 3. And be it further enacted,

" The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses, the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of the cause, civil or

or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, . . . "

SEC. 10. And be it further enacted, That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

NEW YORK CIVIL PRACTICE LAW AND RULES

§ 302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction.
As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

3. commits a tortious act without the state causing injury to person or property within the state, . . .
., if he

(i)
. . engages in any other persistent course
of conduct,
., or

4. owns, uses or possesses any real property situated within the state.

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SECOND CIRCUIT

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PLAINTIFF-APPELLANT

-against-

SHIRLEY E. FAHEY,
NORMAN F. CODO,
DEFENDANTS-APPELLEES

) DOCKET NO.: 77-7047

) APPELLANT'S SUBMISSION
) OF REPLY BRIEF

Plaintiff-Appellant respectfully submits
Reply Brief.

Patricia A. Fahey

Patricia A. Fahey

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March 23rd, 1977

ADMISSION OF SERVICE

The undersigned acknowledges
receipt of a copy of the within:

on *March 23* 19 *77*

at *2 36* o'clock

Attorney(s) for

BY: *Barbara J. Schildick*
per Paul D. Wilby

DOCKET NO. 77-7047 YEAR 1977

UNITED STATES COURT OF APPEALS
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PLAINTIFF-APPELLANT'S SUBMISSION OF
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